

NO. 82-1724

In The
Supreme Court of the United States
OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER AND SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

MOTION FOR DIVIDED ARGUMENT

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SUPREME COURT: U.S.

Pursuant to Rules 38.4 and 42 of the Rules of this Court, Counsel for Respondent Susan Butler hereby moves this Honorable Court for permission to present oral argument in the above-captioned matter.

The state has focused its attention in this case on what it perceives as compelling state interests which, it claims, are vindicated by the statute before this Court. Stressing the right of its citizens to walk the streets free of solicitations for "deviate" sex, the state apparently takes the position that all such solicitations are offensive per se.

From the course which this case has followed through the courts of New York State, it is believed that Respondent Uplinger will focus upon a number of constitutional rights which the statute violates (i.e., freedom of speech and association, the right to privacy, and equal protection). In this vein, Respondent Uplinger will likely argue that it is an individual's constitutional right to discreetly solicit, in public, what New York describes as "deviate sexual intercourse" (New York State Penal Law §130.00 subd. 2).

In one very important aspect, it may well be that Respondent Butler's position will differ significantly from Appellant's and from Respondent Uplinger's. While their respective positions will likely pit compelling state

interests against individual rights, Respondent Butler contends that these considerations are of secondary importance to the central issue--i.e., that the statute is unconstitutionally vague on its face.

Respondent Butler's void-for-vagueness claim will be argued not only in light of the precedent established in this Court, but also on the basis of the decision rendered below by New York's Court of Appeals, as viewed against New York's firmly established legal precedent with respect to loitering statutes. (In light of the New York precedent in this area, this Court may well decide that adequate state grounds exist to support the Court of Appeals' decision, and dismiss the writ of certiorari herein as improvidently granted.)

If the statute is unconstitutionally vague, the showdown between compelling state interests and individual rights will have to await another day in court. Those competing interests can only be reckoned with if they clash under a properly drafted statute--one that does not suffer from vagueness--unlike the one presently before this Court.

Divided argument, it is respectfully submitted, will be helpful to the Court in exploring this alternative position presented on behalf of Respondent Butler.

William H. Gardner, Counsel for Respondent Uplinger, has indicated that he will not oppose this motion, and has

also indicated his willingness to allow Counsel for Respondent Butler ten minutes of the thirty minutes allotted for oral argument. Counsel for Respondent Butler is of the opinion that ten minutes provides adequate time to present his position.

WHEREFORE, this Court is respectfully requested to grant Respondent Butler's motion for divided argument in accordance with the time allotments specified herein.

Respectfully submitted,

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